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No. _____

In The

Supreme Court of the United States

October Term, 1998

THOMAS R. DONOVAN,

Petitioner,

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit may abrogate its jurisdictional mandates by failing to provide a statutory interpretation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 12

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Albun v. Brown, 9 F.3d 1528 (Fed. Cir. 1992) 5

Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998) 10

Brown v. Gardner, 513 U.S. 115 (1994) 6, 10

Caminetti v. United States, 242 U.S. 470 (1917) 9

Coffey v. Republic Steel Corp., 447 U.S. 191 (1980) 10

Connecticut Nat'l Bank v. Germain, 112 S.Ct. 1146 (1992) 9

Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 9

Donovan v. West, 158 F.3d 1377 (Fed. Cir. 1998) 1

Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946) 10

Garcia v. United States, 469 U.S. 70 (1984) 9

Hallstrom v. Tillamook County, 493 U.S. 20 (1989) 9

King v. St. Vincent's Hospital, 502 U.S. 215 (1991) 10

Mallard v. United States Dist. Court, 490 U.S. 296 (1990) 9

Smith v. Brown, 35 F.3d 1516 (1993) 8

United States v. Ron Phair Enter., Inc., 489 U.S. 235 (1989) 9

STATUTES

28 U.S.C. § 1254(1) 1

38 U.S.C. § 1154b 7

TABLE OF AUTHORITIES – Continued

Page

38 U.S.C. § 5109A 7, 8, 9, 11

38 U.S.C. § 7292 .....1, 5, 8, 9

38 U.S.C. § 7292(c) 5

38 U.S.C. § 7292(d)(2) 5

REGULATIONS

38 C.F.R. § 3.105 .....7, 8

38 C.F.R. § 3.105(a) 7

OTHER AUTHORITIES

H.R. Rep. No. 100-963, 100th Cong., 2d Sess. 10, *reprinted in*, 1988 U.S.C.C.A.N. 5782 4

Pub. L. No. 100-687, 102 Stat. 4105 (1988) 4

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is published as 158 F.3d 1377 (Fed.Cir. 1998) and reprinted in the Appendix ("App.") at App. 1. The opinion of the Court of Veterans Appeals in *Donovan v. West* is published at 10 Vet.App.404 (1997) and reprinted at App. 2.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on October 26, 1998.

PROVISIONS INVOLVED

38 U.S.C. § 7292. Review by United States Court of Appeals for the Federal Circuit

(a) After a decision of the United States Court of Veteran Appeals is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of any statute or regulation (other than a refusal to review the schedule or ratings for disabilities adopted

under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Veterans Appeals within the time and in the manner prescribed for appeal to United States court of appeals from United States district courts.

(b)(1) When a judge or panel of the Court of Veterans Appeals, in making an order not otherwise appealable under this section, determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Secretary with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question. That court may permit an interlocutory appeal to be taken on that question if such a petition is filed with it within 10 days after the certification by the chief judge of the Court of Veteran Appeals. Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Veterans Appeals, unless a stay is ordered by a judge of the Court of Veterans Appeals or by the Court of Appeals for the Federal Circuit.

(2) For purposes of subsections (d) and (e) of this section, an order described in this paragraph shall be treated as a decision of the Court of Veteran Appeals.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of Title 28.

(d)(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The Court shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Veterans Appeals that the Court of Appeals for the Federal Circuit find to be –

(A) arbitrary, capricious an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law.

(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

(e)(1) Upon such review, the Court of Appeals for the Federal Circuit shall have power to affirm, or, if the decision of the Court of Veterans Appeals is not in accordance with law, to modify or reverse the decision of the Court of Veterans Appeals or to remand the matter, as appropriate.

(2) Rules of review of decisions of the Court of Veterans Appeals shall be those prescribed by the Supreme Court under section 2072 of Title 28.

STATEMENT OF THE CASE

1. Until 1988, when Congress enacted the Veteran's Judicial Review Act, the Veteran Administration stood in "splendid isolation as the single federal administrative agency whose major functions were explicitly isolated from judicial review." H.R. Rep. No. 100-963, 100th cong., 2d Sess. 10, *reprinted in*, 1988 U.S.C.C.A.N. 5782, 5791. When the 1988 Act was finally passed, the final legislation contained five crucial components: previous preclusion of judicial review of veteran benefit entitlements was repealed; the United States Court of Veterans Appeals (CVA) was created; the Board of Veterans' Appeals (BVA) was retained as the final administrative decisional body with the Department of Veteran Affairs;, a $10 attorney's fee cap was abolished; and most importantly for the issues discussed in this writ, an additional level of judicial review was created by allowing review of CVA decisions by the United States Court of Appeals for the Federal Circuit (Federal Circuit) on certain narrow issues of law. *See*, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

The Federal Circuit has a **limited**, but vital role in judicial review of veteran claims. Pursuant to 38 U.S.C. § 7292, parties who are dissatisfied with a CVA decision have a statutory right to take an appeal to the Federal Circuit. However, as a statistical matter, substantial appellate review for most cases ends at the CVA. Since 1990, the CVA has disposed of over 10,000 cases. *See*, Prof. William A. Fox, *An Analysis of Jurisprudence, Organization, and Operation of the Newest Article One Court*, Published by the Paralyzed Veterans of America, 2d ed. 182 (1998). In comparison, the Federal Circuit has issued full opinions on only a small number of its appeals on the merits. *Id.* One reason for the relatively small number of cases decided by the Federal Circuit on the merits is due to the Federal Circuit's limited jurisdiction. The Federal Circuit "has **exclusive** jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, **and to interpret constitutional and statutory provisions**, to the extent presented and necessary to a decision." *See*, 38 U.S.C. § 7292(c) (*emphasis added*). CVA factual determinations are insulated from Federal Circuit review unless the facts implicate constitutional questions. *See*, 38 U.S.C. § 7292(d)(2). If appeal to the Federal Circuit does not raise a constitutional question or a question as to interpretation of constitutional or statutory provision or question as to a regulation's validity relied upon by the CVA, the Court is required to dismiss the appeal for lack of jurisdiction. *See, Albun v. Brown*, 9 F.3d 1528 (Fed. Cir. 1992).

Beyond Federal Circuit review, dissatisfied parties may petition the Supreme Court for writ of certiorari.

However, in the ten years that the CVA has been in existence, the Supreme Court has granted only one certiorari petition, *Brown v. Gardner*, 513 U.S. 115 (1994), a case involving large implications for the CVA and Federal Circuit regarding the proper canons of construction for statutory and regulatory review. Thus, in all practicality to date, a veteran's last opportunity for judicial review of veteran benefits issues has been in the Federal Circuit. Such a practicality makes it quite clear that the Federal Circuit's role in statutory and regulatory interpretation is essential to ensure the veteran's statutory right to judicial review of CVA.

2. Thomas Donovan served in the U.S. Army from April 1941 through November 1945. After his discharge, Mr. Donovan applied to the Veterans' Administration (VA) for a service connected disability for a stomach condition and psychoneurosis. The Regional Office (RO) issued a rating decision dated August 1947, denying both of Mr. Donovan's claims.

In 1985, Mr. Donovan submitted another application for disability benefits based on a claim of Post Traumatic Stress Disorder (PTSD). In April 1986, the RO denied service connection for PTSD. Mr. Donovan filed a notice of disagreement and perfected his appeal to the BVA. In a May 13, 1988 decision, the BVA denied Mr. Donovan's claim for PTSD.

In 1991, Mr. Donovan filed two claims with the VA. First, he requested that his 1985 claim for PTSD be reopened. Second, Mr. Donovan alleged that the August 1947 decision contained clear and unmistakkable error (CUE) because the Regional Office failed to apply the

statutory presumption afforded to combat veterans as provided in 38 U.S.C. § 1154b when making a determination of service connection for Mr. Donovan's stomach condition and psychoneurosis. In July 1993, the VA granted Mr. Donovan's first request and assigned Mr. Donovan a 10% rating for PTSD with an effective date of November 5, 1991, the date Mr. Donovan applied to reopen his 1985 claim for PTSD.

On December 12, 1995, the BVA determined that the August 1947 decision was not subject to CUE review because the 1988 BVA decision subsumed review of the August 1947 decision.

On September 29, 1997, the CVA upheld the BVA's finding that the August 1947 RO decision could not be collaterally attacked since the "1988 BVA decision made a de novo review and essentially (by implication) reviewed the 1947 decision. Therefore, the Court finds that the 1947 decision was subsumed by the 1988 BVA decision . . . "

On appeal to the Federal Circuit, Mr. Donovan presented the issues of statutory and regulatory interpretation by arguing that the CVA erroneously interpreted 38 C.F.R. § 3.105(a) to prohibit him from challenging CUE in the unappealed 1947 RO decision and that the plain language of 38 C.F.R. § 3.105 contained no language that would support the CVA's "subsuming" argument. Further, Mr. Donovan claimed that the enactment of 38 U.S.C. § 5109A, and the statute's plain language, made clear that the "subsuming" argument relied upon by the CVA was not valid.

In a October 26, 1998 decision, the Federal Circuit affirmed the CVA's decision finding that Mr. Donovan

could not challenge the 1947 decision once the BVA denied service connection in its May 1988 decision. The Federal Circuit provided no interpretation of either 38 C.F.R. § 3.105 or 38 U.S.C. § 5109A, yet still determined that no error existed in the CVA's decision and that 38 U.S.C. § 5109A made no substantive change in the CUE regulation.

REASONS FOR GRANTING THE WRIT

The Federal Circuit's opinion completely disregards its mandatory jurisdiction as provided in 38 U.S.C. § 7292 by failing to provide an interpretation of 38 U.S.C. § 5109A and 38 C.F.R. § 3.105 as requested by the very issues in the case before it. The Federal Circuit's opinion below is conspicuous for the absence of even one citation to any of the few cases heard by this Court regarding the canons of construction for veteran benefits statutes. Statutory and regulatory interpretation lie at the very heart of the Federal Circuit's very limited jurisdiction. As such, the Federal Circuit's failure to provide the required interpretation nullifies the mandates of their jurisdictional statute in the context of veteran benefit's laws. In essence, allowing the Department of Veteran Affairs to return to the state of "splendid isolation" it enjoyed prior to the enactment of the Veterans Judicial Review Act.

As stated *supra*, the Federal Circuit is vested with limited authority to review CVA decisions on pure questions of law. *See*, 38 U.S.C. 7292, *Smith v. Brown*, 35 F.3d 1516, 1517 (1993). This statutory authority "**commands** that this Court (Federal Circuit) **shall** decide all relevant

questions of law" and set aside any questions of statutory or regulatory interpretation that are not lawful. *Id.*, (*emphasis added*).

Interpretation of any veteran benefit statute or regulation begins with the language itself. This Court has often stated "[i]nterpretation of a statute must begin with the statute's language." *Mallard v. United States Dist. Court*, 490 U.S. 296, 300 (1990); *see, e.g., Hallstrom v. Tillamook County*, 493 U.S. 20, 25 (1989); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). When "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " *United States v. Ron Phair Enter., Inc.*, 489 U.S. 235, 241 (1989), *citing, Caminetti v. United States*, 242 U.S. 470, 485 (1917). "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what is says there- . . . . When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). Further, a court may deviate from the plain language of a statute only upon the "most extraordinary" showing of a contrary Congressional intent. *Garcia v. United States*, 469 U.S. 70, 75 (1984).

In the present case, the Federal Circuit's opinion is devoid of any examination of 38 U.S.C. § 5109A's plain language. The Federal Circuit merely adopts the CVA's holding and does so without any articulation of the statute's plain meaning. This failure contravenes the direct mandates of 38 U.S.C. § 7292 and renders the Federal Circuit a mere "rubber stamp" of the CVA. The Federal Circuit was obligated to indicate whether the language of

the statute was plain or ambiguous. The decision below does neither. The Federal Circuit's failure to provide such statutory interpretation is even more egregious in light of the unique canons of construction regarding interpretation of veteran benefits law.

This Court, in *King* and *Gardner, infra,* has made it perfectly clear that veteran benefit statutes must be construed in a light most favorable to the veteran. Once the Federal Circuit reviews the plain language of the statute, then the Court is obligated to interpret or construe the statute in the manner which most benefits the veteran. This Court has definitively ruled on the issue of statutory interpretation as it relates to veteran benefits statutes. In *King v. St. Vincent's Hospital,* 502 U.S. 215, 220-221 (1991), the Court held that the veteran benefits statutes must be interpreted in favor of the veteran and against the government. This holding was expressly affirmed and used as support for this Court's holding in *Brown v. Gardner, supra,* when this Court determined that the government's interpretation of 38 U.S.C. § 1151 was without merit. This Court has further held that veteran statutes must be **liberally construed** for the benefit of veterans. *See, Coffey v. Republic Steel Corp.,* 447 U.S. 191, 196 (1980) (*emphasis added*), *citing, Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 278 (1946). Clearly, this Court's holdings are premised on Congress' intent to create a uniquely benevolent statutory scheme in which veterans are entitled to the resolution of doubt in their favor on every issue, which obviously includes an interpretation of a statute. *See, Bailey v. West,* 160 F.3d 1360, 1370 (Fed. Cir. 1998).

This canon of statutory construction further establishes the vitality of the Federal Circuit's jurisdictional

responsibilities. Meaning, that for years, veterans were denied the right to judicial review of VA determinations. In essence, the VA was allowed to dictate statutory interpretation without the oversight afforded by judicial review. In 1988, Congress determined that the VA would be no longer entitled to enjoy the era of splendid isolation and created the CVA to entertain questions of fact and law. To further ensure that the veteran was afforded utmost protection when it came to issues of statutory and regulatory interpretation, Congress mandated that the Federal Circuit review of CVA decisions be limited to constitutional questions and issues of statutory and regulatory interpretation. Additionally, this Court has recognized the intent of Congress as requiring that veteran benefit statutes be interpreted in the veteran's favor. Such a requirement is vital in light of the VA's historical freedom from judicial review.

Thus, the Federal Circuit performs two very important functions. First, it acts to provide statutory and regulatory interpretation. Second, the Federal Circuit ensures that the veteran benefit statutes and regulations have been interpreted in the veteran's favor.

In the present case, the Federal Circuit clearly failed in its statutory mandate by failing to undertake statutory interpretation of 38 U.S.C. § 5109A. The Federal Circuit failed to examine the plain language of either the regulation or the statute. In addition, the Federal Circuit clearly failed to determine whether the interpretation afforded by the CVA to the regulation or statute had been made by the CVA in the veteran's favor.

The Federal Circuit's failure has a wide reaching effect because it dispenses with Congressional mandate for the Federal Circuit's relationship to veteran benefits law and undermines Congressional intent in creating this "uniquely benevolent" adjudication system. In addition, it allows the Federal Circuit to essentially ignore the dictates of this Court, which is especially egregious in light of this Court's limited holdings on veteran benefits issues. As such, it is imperative for this Court to instruct the Federal Circuit regarding its statutory duty so that all veterans are afforded proper appellate review as Congress intended.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

DONOVAN v. WEST

Cite as 158 F.3d 1377 (Fed. Cir. 1998)

Thomas R. DONOVAN, Claimant-Appellant,

v.

Togo D. WEST, Jr., Secretary of Veterans Affairs, Respondent-Appellee.

No. 98-7019.

United States Court of Appeals,
Federal Circuit.

Oct. 26, 1998.

Robert V. Chisholm, Chisholm & Chisholm, of Providence, RI, argued for claimant-appellant.

Agnes Brown, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for respondent-appellee. With her on brief were Frank W. Hunger, Assistant Attorney General, David M. Cohen, Director, and Sharon Y. Eubanks, Deputy Director. Of counsel on brief were Donald E. Zeglin, Deputy Assistant General Counsel, and David J. Barrans, Staff Attorney, U.S. Department of Veteran Affairs, of Washington, DC.

Michael P. Horan, Associate General Counsel, Paralyzed Veterans of America, for amicus curiae Paralyzed Veterans of America.

Before PLAGER, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and RADER, Circuit Judge.

FRIEDMAN, Senior Circuit Judge.

This appeal presents a question about the meaning and effect of a regulation of the Department of Veterans Affairs (VA), 38 C.F.R. § 3.105(a) (1997), providing that otherwise final determinations of the agency's regional offices will be "reversed or amended" if there is "clear and unmistakable error." The appellant Donovan contends that under this provision he may challenge a final decision of the VA regional office denying his claim for a service-connected disability, despite an intervening decision of the VA Board of Veterans' Appeals that rejected his claim. The Court of Veterans Appeals denied Donovan's contention. We agree, and therefore affirm.

I

The underlying facts are undisputed. Donovan served in the Army from 1941 to 1945. In 1946 he applied to the VA (then known as the Veteran's Administration) for benefits for various disabilities, including "Stomach Condition," "Headaches," and "Nervous Condition." A July 1947 VA physical examination indicated that Donovan had gastric neurosis and psychoneurosis secondary to gastrointestinal disturbance.

In 1947, the VA regional office, where Donovan had filed his claim, denied the claim based on lack of "service responsibility for gastric neurosis and psychoneurosis." Donovan did not appeal that decision to the Board of Veterans' Appeals, and the decision became final one year later. *See* 38 U.S.C. § 7105(c) (1994). That provision further provides that "the claim will not thereafter be reopened or allowed, except as otherwise provided by

regulations not inconsistent with this title." A VA regulation provides for reconsideration of such final claims if they involve "clear and unmistakable error." 38 C.F.R. § 3.105(a). In addition, the Secretary must reopen and review a claim if "new and material evidence is presented or secured." 38 U.S.C. § 5108 (1994).

Thirty-eight years later, in 1985, Donovan filed another claim for benefits, this time based on Delayed Post Traumatic Stress Disorder (Stress Disorder). After a VA psychiatric examination concluded that Donovan did not have that condition, the regional office denied the claim. This time Donovan appealed the denial to the Board of Veterans' Appeals.

The VA conducted another psychiatric examination, which also concluded that Donovan did not suffer from Stress Disorder. After a hearing, the Board in May 1988 held that "[e]ntitlement to service connection for a chronic acquired psychiatric disability, to include post-traumatic stress disorder, is not established," and denied the appeal. The Board noted that in 1947 Donovan had been "denied entitlement to service connection for gastric neurosis and a secondary psychoneurosis," that "[i]n 1985, the claim was reopened and was expanded to include consideration of entitlement to service connection for post-traumatic stress disorder," and that "the Board has reviewed the entire evidence of record and is making a de novo determination."

The Board stated that "[a] review of the service medical records reveals normal psychiatric status" and that in a VA 1947 examination:

> [t]he veteran exhibited no asocial or psychotic trends. He displayed no particular tension or apprehension. He was primarily concerned with nausea and vomiting of several years' duration. The diagnoses were gastric neurosis and secondary psychoneurosis.

The Board concluded:

> [t]he Board has carefully considered all the evidence of record and is mindful of the requirement that all reasonable doubt must result in favor of the veteran. While we do not doubt that the veteran experienced traumatic events during the war, the evidence since his discharge from service does not demonstrate that he has a psychiatric disorder, including post-traumatic stress disorder, as a result of that service. Two recent special psychiatric examinations found no psychiatric disorder.

The Board found that "[a] chronic acquired psychiatric disorder was not present during active service," and concluded that "[a] chronic acquired psychiatric disability, to include post-traumatic stress disorder, was not incurred in or aggravated by active service."

Donovan tried again in April 1991, this time with more success. He asserted that it was "clear and umistakable error to deny service connection" for his "chronic acquired psychiatric disability," in view of the "diagnosis of psychoneurosis" made in July 1947, the "complaints" shown by the record, and his "heroic achievement in connection with military operations against an enemy of the United States," for which he was awarded a bronze star.

Two VA psychiatric examinations then concluded that Donovan had Stress Disorder. The regional office reopened his claim – presumably because of this new and material evidence – and granted service connection for Stress Disorder with disability payments effective November 5, 1991.

Donovan then requested that the payments be made retroactive to July of 1947, "when the diagnosis of psychoneurosis was made." The regional office denied that request and Donovan appealed that ruling to the Board of Veterans' Appeals which, after an informal hearing, affirmed in 1995. The Board found that "[T]he claim of clear and unmistakable error in the August 4, 1947 RO denial of service connection for a psychoneurosis does not have legal merit." The Board stated that in its 1988 decision:

> the Board noted that a claim for service connection for a psychoneurosis was denied by the RO in August 1947. The veteran did not appeal the 1947 RO decision so, as a consequence, it became final. *See* 38 C.F.R. § 20.1103 (1994). The Board also found that, neither the evidence available when the RO took action in 1947, nor that available thereafter, provided a factual basis for granting the claim of service connection, in effect denying the claim of service connection on the merits. Indeed, it was expressly noted that the claim was being reviewed on a *de novo* basis (i.e., based on the entire record). Therefore, the Board now concludes that the May 1988 decision denying service connection was not limited to the question of whether a claim should be reopened, but extended to an analysis

> of the merits of the underlying question of service connection. The significance of the May 1988 Board denial is that, unlike RO decisions, a collateral attack on a final Board decision under the auspices of rules governing claims of clear and unmistakable error may not be made. *Smith v. Brown*, 35 F.3d 1516 (Fed.Cir.1994). If the issue addressed in the 1947 RO decision is treated as encompassing the question of service connection for a chronic acquired psychiatric disability, as the Board apparently did in 1988, the prior unappealed RO denial would be considered as having been, in effect, subsumed by the May 1988 Board denial on the merits and likewise immune from collateral attack under a theory of clear and unmistakable error.

The Board cited a precedential opinion of its general counsel which bound it, *see* 38 U.S.C. § 7104(c) (1994), as ruling that "a claim of clear and unmistakable error under 38 C.F.R. § 3.105(a) concerning a final, unappealed RO decision may not be considered where the Board has previously reviewed the entire record of the claim following subsequent reopening and has denied the benefit previously denied in the unappealed decision." The Board held, however, that the proper date for the beginning of benefits was May 1, 1991 and not the later November date the regional office used.

A divided Court of Veterans Appeals affirmed. *Donovan v. Gober*, 10 Vet.App. 404 (1997). The court stated:

> the 1988 BVA decision made a de novo review and essentially reviewed the 1947 RO decision. Therefore, the Court finds that the 1947 RO decision was subsumed by the 1988 BVA decision and that the BVA was correct in denying the

> appellant's claim for CUE as no CUE existed as a matter of law. . . . Even assuming that a CUE claim is not precluded by *Smith [v. Brown*, 35 F.3d 1516 (Fed Cir.1994)], on the theory that the 1988 BVA decision did not limit its review to only the evidence before the RO in 1947, a determination by the Court of the existence of CUE since 1947 would of necessity mandate service connection to the present time. Such a determination would, in effect, overturn the 1988 BVA decision. The Court, however, is precluded from reviewing a BVA decision that is not the subject of this appeal. *See* 38 U.S.C. §§ 7252(a), 7266(a)(1).

Id. at 408-09.

Judge Steinberg, dissenting, would have reversed and remanded to the Board of Veterans' Appeals to adjudicate the claim of "clear and unmistakable error" in the 1947 regional office decision. In his view, because the Board's 1988 decision also considered new negative evidence regarding Donovan's claimed disability, that "decision thus has no bearing upon whether the RO committed CUE in 1947. . . . An adjudication by an RO currently of a claim of CUE in the 1947 RO decision could not and would not produce the kind of collateral attack on the 1988 BVA decision about which the Federal Circuit expressed concern in *Smith*, because in that 1988 BVA decision the Board concluded only that, based upon the evidence *in 1988*, the veteran was not entitled to service connection *in 1988*. Hence, any RO adjudicating CUE could not consider the evidence newly presented in 1988 and would be concerned only with the veteran's entitlement in 1947 on the record then before the RO."

One month after the Court of Veterans Appeals entered its judgment, Congress enacted Pub.L. No. 105-111, 111 Stat. 2271 (1997) (codified at 38 U.S.C. §§ 5109A, 7111) (discussed below), dealing with correction of "clear and unmistakable error." Donovan then simultaneously filed a motion for reconsideration in light of the new statute and a notice of appeal to this court. The Court of Veterans Appeals denied that motion as moot, because the filing of the notice of appeal deprived the court of jurisdiction over the case. In a subsequent decision, the Court of Veterans Appeals ruled that Pub.L. 105-111 "does not affect the Court's decision[ ] in . . . *Donovan*." *Dittrich v. West*, 11 Vet.App. 10, 11 (1998), *appeal pending*, No. 98-7031 (Fed. Cir., argued Sept. 2, 1998).

II

The question Donovan presents is whether, despite the 1988 Board decision denying his claim for a service-connected disability based on his psychiatric disorder, VA regulation 38 C.F.R. § 3.105(a) permits him now to challenge the regional office's 1947 decision for "clear and unmistakable error." We have jurisdiction to review that ruling under 38 U.S.C. § 7292(c) (1994), which gives us jurisdiction "to review and decide any challenge to the validity of any . . . regulation or any interpretation thereof."

A. The pertinent portions of the VA regulation state:

> Previous determinations which are final and binding . . . will be accepted as correct in the absence of clear and unmistakable error. Where

> evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of clear and unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision.

38 C.F.R. § 3.105(a).

Although the 1988 Board decision did not use the words "clear and unmistakable error," we conclude that the Board determined that no such error infected the 1947 regional office's decision. The Board noted that it had "reviewed the entire evidence of record," which necessarily included the record relating to the 1947 decision, that it was "making a de novo determination," and that "the evidence since [Donovan's] discharge from service [in 1945] does not demonstrate that he has a psychiatric disorder including post-traumatic stress disorder, as a result of that [military] service." The Board described the results of the 1947 VA examination, found that "[a] chronic acquired psychiatric disorder was not present during active service," and concluded that "[a] chronic acquired psychiatric disability, to include post-traumatic stress disorder, was not incurred in or aggravated by active service."

We therefore agree with the Board's conclusion in its 1995 decision that the Board's

> May 1988 decision denying service connection was not limited to the question of whether a claim should be reopened, but extended to an

> analysis of the merits of the underlying question of service connection.
>
> . . . If the issue addressed in the 1947 RO decision is treated as encompassing the question of service connection for a chronic acquired psychiatric disability, as the Board apparently did in 1988, the prior unappealed RO denial would be considered as having been, in effect, subsumed by the May 1988 Board denial of the merits and likewise immune from collateral attack under a theory of clear and unmistakable error . . . The May 1988 decision is a final decision of the Board denying, on the merits, a claim for service connection for a chronic acquired psychiatric disability, to include a psychoneurosis and PTSD.

As the Court of Veterans Appeals explained:

> the 1988 BVA decision made a de novo review and essentially reviewed the 1947 RO decision. Therefore, the Court finds that the 1947 RO decision was subsumed by the 1988 BVA decision and that the BVA was correct in denying the appellant's claim for CUE as no CUE existed as a matter of law.

In sum, although in its 1988 decision the Board, on the basis of the augmented record before it, held that Donovan had not established "service connection for a chronic augmented psychiatric disorder," it also ruled that the record before the regional office in 1947 did not show error, much less "clear and unmistakable error" in that office's decision in that year denying Donovan's claim based upon "gastric neurosis and psychoneurosis." That is precisely the issue that Donovan now seeks to litigate in the present case. The ruling in the 1993 Board

decision and in the decision of the Court of Veterans Appeals that the Board's 1988 decision rejecting Donovan's claim "subsumed" the 1947 regional office decision appears to be a short-hand statement summarizing the foregoing reasoning.

The 1988 Board decision bars him from relitigating this issue for several reasons. First, if the regional office were now to attempt to decide that question *de novo*, it would be reviewing a decision of the appellate tribunal that customarily reviews the decisions of the regional offices. As the Court of Veterans Appeals pointed out in the present case, a regional office "must not be placed in the anomalous position of reviewing the decision of the BVA, a superior tribunal." See *Smith*, 35 F.3d at 1526, where this court stated that it would be "odd[ ]" to "permit an inferior [the regional office] to collaterally review the actions of a superior [the Board], at least as an initial matter."

Second, the governing statute makes Board decisions "final," unless the Chairman of the Board orders reconsideration, 38 U.S.C. § 7103(a) (1994), (or if, as the new statute permits (see below), the Board decision itself is challenged for "clear and unmistakable error"). The Chairman did not order reconsideration of the Board's 1988 decision. Moreover, except where "new and material evidence is presented or secured," 38 U.S.C. § 5108 (1994), "when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered." 38 U.S.C. § 7104(b) (1994). At oral argument Donovan stated that his claim of "clear and unmistakable error" in the 1947 regional office's decision was based solely on the

evidence presented to that office at that time, and not upon any new evidence. Permitting reconsideration by the regional office of that office's 1947 decision would violate the finality of the 1988 Board decision that there was no "clear and unmistakable error" in the 1947 decision.

Third, nothing in 38 C.F.R. § 3.105(a) indicates, or even suggests, that in permitting otherwise final determinations to be reopened or amended for "clear and unmistakable error," it was intended to permit departure from the settled principles governing the administration of veterans benefits claims just discussed. To the contrary, the right to reopen claims for such error is subject to those principles, and as we have indicated, those principles bar consideration at this time of the claim of "clear and unmistakable error" in the 1947 Board decision.

B. Donovan contends that Pub.L. No. 105-111 "[s]upersedes" 38 C.F.R. § 3.105(a), and "[t]hus [n]ullif[ies] the [d]ecision [b]elow." He urges that the case should be remanded to the Court of Veterans Appeals for "review and application of" the new statute.

Pub.L. No. 105-111, however, made no change in the substantive standards in the regulation governing modifications of a regional office decision because of "clear and unmistakable error." It merely codified the prior regulation. *See* S.Rep. No. 105-157, at 4-5, 8 (1997); H.R.Rep. No. 105-52, at 1 (1997). Thus, if the Court of Veterans Appeals were to reconsider this case under the new statute, it would reach the same conclusion it reached under the regulation. Indeed, that court so indicated in *Dittrich*, where it stated that the new law "does

not affect the Court's decision[ ] in . . . *Donovan.*" 11 Vet.App. at 11.

The pertinent provisions of Pub.L. 105-111 state:

> (a) A decision by the Secretary under this chapter is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.
>
> (b) For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.
>
> (c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Secretary on the Secretary's own motion or upon request of the claimant.
>
> (d) A request for revisions of a decision of the Secretary based on clear and unmistakable error may be made at any time after that decision is made.

Although more detailed than the regulation, the basic substantive provision in the statute is the same as that in the regulation. The regulation provides that "final and binding" decisions "will be accepted as correct" in the absence of "clear and unmistakable error," and that if such error is established, the decision "will be reversed or amended." The statute states that a decision of the Secretary may be revised for "clear and unmistakable error," and that if such error is established, the decision "shall be reversed or revised."

Although the statute, unlike the regulation, provides that a request for revision of a decision for "clear and unmistakable error" may be made "at any time after that decision is made," that provision relates only to the timing of such a request. It makes explicit what was implicit in the regulation: that there is no time-bar upon such requests. *See Smith*, 35 F.3d at 1527 (referring to "the unquestionable proposition that RO decisions always can be challenged for ancient CUE"). As a mere codification of the regulation, the provision does not permit something the regulation would not: a collateral challenge to a regional office decision after the Board has sustained it.

In a separate section, Pub.L. No. 105-111 also provides that a decision of the Board may be reviewed for "clear and unmistakable error." That provision was a reaction to our decision in *Smith*, 35 F.3d at 1526, which held that the "clear and unmistakable error" regulation applied only to regional office decisions and not to those of the Board. That change is irrelevant in this case because, as Donovan stated at oral argument, he asserts "clear and unmistakable error" only in the 1947 regional office decision and not in the subsequent Board decisions.

C. The Paralyzed Veterans of America has filed an amicus brief challenging the Board's reliance in its 1995 decision on the opinion of the VA's General Counsel. It asserts that the Board improperly applied that opinion retroactively. The argument was not made in the Court of Veterans Appeals, however, and we decline to consider it, particularly since the contention is made solely by an amicus and Donovan has not adopted or approved it. *See Russian River Watershed Protection Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1141 n. 1 (9th Cir.1998).

CONCLUSION

The judgment of the Court of Veterans Appeals is *AFFIRMED*.

United States Court of Appeals
for the Federal Circuit

98-7019

THOMAS R. DONOVAN,

Claimant-Appellant,

v.

TOGO D. WEST, JR.,
Secretary of Veterans Affairs,

Respondent-Appellee.

JUDGMENT

ON APPEAL from the United States Court of Veterans Appeals

in CASE NO(S). 96-196

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED OCT 26 1998

/s/ Jan Horbaly
Jan Horbaly, Clerk

ISSUED AS A MANDATE: DECEMBER 17, 1998

APPENDIX B

Thomas R. DONOVAN, Appellant,

v.

Hershel W. GOBER, Acting Secretary of Veterans Affairs, Appellee.

No. 96-196.

United States Court of Veterans Appeals.

Sept. 29, 1997.

Thomas R. Donovan, pro se.

Mary Lou Keener, General Counsel, Ron Garvin, Assistant General Counsel, R. Randall Campbell, Deputy Assistant General Counsel and Peter M. Donawick, Washington, DC, were on the brief, for appellee.

Before KRAMER, IVERS, and STEINBERG, Judges.

IVERS, Judge, filed the opinion of the Court. STEINBERG, Judge, filed a dissenting opinion.

IVERS, Judge:

The appellant, a World War II veteran, appeals from a December 12, 1995, Board of Veterans' Appeals (BVA or Board) decision which denied his claim for clear and unmistakable error (CUE) in an August 4, 1947, regional office (RO) decision denying service connection for psychoneurosis. For the reasons stated below the Court will affirm the BVA's December 12, 1995, decision.

I. FACTS

The veteran served on active duty from April 1941 to November 1945, including combat in Europe during which he was awarded the Purple Heart. Record (R.) at

27, 29-30. An October 1945 VA examination was devoid of any complaints of psychological problems. R. at 20-21.

In October 1946 the appellant filed a claim for headaches, a stomach condition, and a nervous condition. R. at 43. In support of his claims he submitted a statement which explained that he had started to experience symptoms related to these ailments while "on maneuvers at the Mohavie [sic] Desert, Calif. about February 1942." R. at 47. In addition, a statement was submitted by his private physician reporting that the appellant suffered from migraines. R. at 50. Also submitted were two statements by men who had served with the appellant and who revealed that the appellant had suffered stomach problems during service. R. at 53-54. A July 1947 VA examination diagnosed gastric neurosis and psychoneurosis secondary to gastrointestinal disturbance. R. at 57-65. In an August 1947 RO decision the appellant was denied service connection for gastric neurosis and psychoneurosis. R. at 68. The appellant did not appeal this decision.

In September 1985 the appellant submitted a claim for service connection for "[d]elayed [PTSD]." R. at 122. In December 1985 the appellant underwent a VA examination with two psychiatrists to determine whether he suffered from PTSD. The impression was:

> No Diagnosis on Axis I – Currently, this veteran's chief complaint is irritability and although he stated that he did come in seeking compensation for [PTSD], he appeared to be quite unclear as to what this meant. He actually does deny most significant psychiatric difficulties. Although he certainly has a stressor due

> to his four years in the service, I cannot see that he meets the criteria for [PTSD] or indeed any other major Axis I disorder. He does appear to have significant frustration related to his long history of tinnitus.

R. at 132.

In February 1986 the appellant underwent a VA social and industrial survey. The social worker opined that there were no "industrial related problems." He stated, "I do not see any severe symptomatology, but rather mild forms of withdrawal, anger, agitation, frustration over his hearing problems, and some moodiness which may be looked upon as depression." He concluded, "His major problems continue to be his hearing deficit and his recurring headaches." R. at 128. In an April 1986 rating decision, the RO denied service connection for PTSD. R. at 136-37.

The appellant filed a Notice of Disagreement (NOD). R. at 145. A Statement of the Case (SOC) was issued. R. at 148-51. The appellant submitted VA Form 1-9, Appeal to the Board of Veterans' Appeals (Form 1-9). R. at 153.

On January 8, 1987, the appellant testified at a hearing that he was not presently receiving psychiatric treatment nor had he received psychiatric treatment in the past 10 years. R. at 159. He revealed that he "periodically" had nightmares of tanks being hit and his buddies being killed. R. at 160.

In February 1987 the appellant underwent a VA examination which determined that there "appears to be no major psychiatric diagnosis on Axis I." R. at 176. In a June 1987 rating decision service connection for PTSD

was denied. R. at 180-81. A Supplemental SOC (SSOC) was issued. R. at 183-86. In May 1988 the BVA denied the appellant's claim for service connection for an acquired psychiatric disability, to include PTSD. R. at 195-200. The Board "reviewed the entire evidence of record and [made] a de novo determination." R. at 196.

In April 1991 the appellant requested that the RO reopen his claim for service connection for PTSD. His representative noted that the appellant had filed a claim for a nervous condition within one year of discharge. He contended that the failure to award service connection in August 1947 for psychoneurosis was CUE. R. at 202.

In May 1991 the RO denied the appellant's request to reopen his claim. R. at 204, 212. The appellant filed an NOD. R. at 214. An SOC was issued. R. at 217-21. The appellant submitted Form 1-9. R. at 223.

In April 1992 the appellant testified that the August 1947 rating decision contained CUE. R. at 228. He stated that he was not currently receiving any psychiatric treatment and that he had worked for 49 years at the same job. R. at 229-30.

In May 1992 the appellant underwent a VA psychiatric examination and was diagnosed with PTSD. The examiner explained:

> Mr. Donovan meets the criteria for PTSD. It is likely that Mr. Donovan did not fully disclose the extent of his symptomatology previously because of a tendency to minimize his symptoms. This appears to be one of his methods of coping with the psychological distress that he

> experiences. His symptoms cause him significant interpersonal difficulty as well as considerable psychological distress.

R. at 248.

In April 1993 the hearing officer rendered his decision finding no CUE in the prior denial of service connection for an acquired psychiatric disorder to include PTSD. It was also noted that a review of the file showed that psychiatric examinations in 1985 and 1987 showed no psychiatric diagnoses. R. at 254. An SSOC was issued. R. at 257-60.

In June 1993 the appellant underwent a VA examination and was diagnosed with PTSD. R. at 268-70. In July 1993 the RO reopened the appellant's claim and granted service connection for PTSD, rated 10% disabling and effective November 5, 1991. R. at 272-73. The appellant argued that the effective date should have been August 1947, the date that the appellant was diagnosed with psychoneurosis. R. at 275.

In October 1993 the RO denied the appellant's claim for an earlier effective date. R. at 278-80. The appellant filed an NOD. R. at 282.

On December 12, 1995, the BVA rendered the decision currently on appeal. The Board determined that the August 1947 RO decision could not be collaterally attacked on the basis of CUE and that an effective date of May 1, 1991, for service connection for PTSD was warranted. R. at 8.

II. ANALYSIS

Section 3.105(a) of title 38, Code of Federal Regulations, provides:

> Previous determinations which are final and binding, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues, will be accepted as correct in the absence of [CUE]. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of [CUE] has the same effect as if the corrected decision had been made on the date of the reversed decision.

38 C.F.R. § 3.105(a) (1996). A claim of CUE is a collateral attack on a final RO decision. *Smith v. Brown*, 35 F.3d 1516, 1521 (Fed.Cir.1994); *Eddy v. Brown*, 9 Vet.App. 52, 57 (1996); *Crippen v. Brown*, 9 Vet.App. 412, 417-18 (1996); *Duran v. Brown*, 7 Vet.App. 216, 224 (1994). The CUE review authority in 38 C.F.R. § 3.105(a) relates only to review of decisions of the agency of original jurisdiction (RO) and not to those of the BVA. *See Smith*, 35 F.3d at 1527. The Court has defined CUE as follows:

> Either the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied. . . . [CUE] is the sort of error which, had it not been made, would have manifestly changed the outcome . . . [, an error that is] undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed.

Crippen, 9 Vet.App. at 418; *Russell v. Principi*, 3 Vet.App. 310, 313 (1992) (en banc). In *Duran*, the Court stated, "After *Smith*, an appellant may still assert a claim of CUE under 38 C.F.R. [§] 3.105(a) of a 'prior, unappealed AOJ [agency of original jurisdiction] decision.' " *Duran*, 7 Vet.App. at 224 (quoting *Smith*, *supra*). The Court continued, "where an AOJ decision was appealed to and affirmed by the Board and thus subsumed by the Board's decision, no claim of 'clear and unmistakable error' under 38 C.F.R. § 3.105(a) exists as a matter of law with respect to that AOJ decision." *Ibid.*; *Smith*, 35 F.3d at 1527; *see also Talbert v. Brown*, 7 Vet.App. 352, 355-56 (1995); 38 C.F.R. § 20.1104 (1996) ("When a determination of the [AOJ] is affirmed by the [BVA], such determination is subsumed by the final appellate decision."); 38 U.S.C. § 7104(a).

The appellant argues CUE in the August 1947 rating decision which denied service connection for gastric neurosis and secondary psychoneurosis as not incurred in or aggravated by service. R. at 68. The appellant did not appeal that decision. In the May 1988 BVA decision, the Board noted that a rating action in August 1947 had denied service connection for gastric neurosis and a secondary psychoneurosis. The Board recounted that, in 1985, the appellant's claim was reopened and "was expanded to include consideration of entitlement to service connection for [PTSD]." The Board then reviewed the entire evidence of record and made a de novo determination. R. at 196. In the BVA's evaluation of the evidence of record, including the July 1947 examination, the Board found that "the evidence since his discharge from service

does not demonstrate that he has a psychiatric disorder, including [PTSD], as a result of that service." R. at 199.

The Secretary refers to VA General Counsel Precedent Opinion 14-95 (May 12, 1995) [hereinafter G.C. Prec. 14-95] in support of the proposition that the reasoning and result in *Smith, supra* can also be applied to a situation where a final unappealed rating decision is subsequently reopened and adjudicated on the merits by the BVA. Secretary's Brief (Br.) at 10. The opinion held:

> A claim of [CUE] under 38 C.F.R. § 3.105(a) concerning a final, unappealed [RO] decision may not be considered where the [BVA] has reviewed the entire record of the claim following subsequent reopening and has denied the benefits previ-ously [sic] denied in the unappealed decision.

G.C. Prec. 14-95 at 6.

> Once the BVA has decided a claim, the Board's decision is final and binding upon VA. *See* 38 U.S.C. §§ 7103(a) [sic]. When a claim is disallowed by the BVA, the claim may not thereafter be reopened and allowed, except upon receipt of new and material evidence, and a claim based on the same factual basis may not be considered. 38 U.S.C. § 7104(b). Exceptions to the finality of BVA decisions are very limited. The Chairman of the Board may order reconsideration under 38 U.S.C. § 7103(a), the Board on its own motion may correct an obvious error in the record under 38 U.S.C. § 7103(c), or, under 38 U.S.C. §§ 5108 and 7104(b), a previously-denied claim may be reopened upon submission or procurement of new and material evidence. Permitting review for CUE of a prior, unappealed [RO]

> decision, where the BVA has reviewed the matter upon reopening, would, as discussed below, tend to undermine the finality of BVA decisions established by the referenced statutes.

G.C. Prec. 14-95 at 3-4. After discussing what constituted new and material evidence to reopen a claim the opinion continued,

> Where a BVA decision involves review of evidence considered in a prior, unappealed [RO] decision con-cerning [sic] the same issues, consideration of a CUE claim regarding the prior [RO] decision would essentially permit review of an issue finally decided by the Board, in a manner not contemplated in the statutes governing finality of Board decisions. Such action would essentially allow a[n RO] to collaterally consider and overturn conclusions reached by the Board concerning the issues raised. This would give rise to the anomalous situation referred to by the Federal Circuit in *Smith* [35 F.3d at 1526] of an inferior tribunal reviewing the decisions of a superior one.
>
> Further, such review would tend to conflict with 38 U.S.C. § 7104(b), in that it could be viewed as involving consideration and potential allowance of a claim on the same factual basis as a claim already denied by the Board. In considering the reopened claim, the Board would have had before it the same evidence considered by the [RO], together with whatever new evidence had been presented or developed in connection with reopening of the claim. While the factual basis considered by the Board would have been expanded and thus not have been identical to that previously considered by the [RO], the evidence subsequently considered by the [RO]

> upon review of allegations of CUE in the prior decision would be identical to evidence previously before the Board upon its review of the reopened claim. Thus, the claim of CUE would lack the new factual basis necessary to overcome the finality of the Board decision.

G.C. Prec. 14-95 at 4-5. The Board, by statute, is required to follow the precedential opinions of VA General Counsel; however, the Court is not. *See* 38 U.S.C. §§ 7261, 7104(c); *see also Sabonis v. Brown*, 6 Vet.App. 426, 429 (1994).

The Secretary asserts that because the conclusion reached by G.C. Prec. 14-95 is consistent with the plain meaning and application that the Federal Circuit established in *Smith* for 38 C.F.R. § 3.105(a), this Court should extend that holding to circumstances where a final unappealed rating decision is subsequently reopened and adjudicated on the merits by the BVA. Secretary's Br. at 12-13. In the alternative, the Secretary maintains that if the Court is unwilling to extend the *Smith* holding to situations similar to this case, the Court should "exercise due deference" to G.C. Prec. 14-95. *Id.* at 13; *see Smith*, 35 F.3d at 1527.

We agree that G.C. Prec. 14-95 is consistent with the *Smith* decision as applied to the facts here. In this regard, the Court notes that the 1988 BVA decision made a de novo review and essentially reviewed the 1947 RO decision. Therefore, the Court finds that the 1947 RO decision was subsumed by the 1988 BVA decision and that the BVA was correct in denying the appellant's claim for CUE as no CUE existed as a matter of law. *See Sabonis*, 6 Vet.App. at 430 ("[W]here the law and not the evidence is

dispositive, the claim should be denied or the appeal to the BVA terminated because of the absence of legal merit or the lack of entitlement under the law."). As the Federal Circuit said in *Smith* and as set forth in the G.C. Prec. 14-95 opinion, an RO must not be placed in the anomalous position of reviewing the decision of the BVA, a superior tribunal. Even assuming that a CUE claim is not precluded by *Smith, supra,* on the theory that the 1988 BVA decision did not limit its review to only the evidence before the RO in 1947, a determination by the Court of the existence of CUE since 1947 would of necessity mandate service connection to the present time. Such a determination would, in effect, overturn the 1988 BVA decision. The Court, however, is precluded from reviewing a BVA decision that is not the subject of this appeal. *See* 38 U.S.C. §§ 7252(a), 7266(a)(1).

III. CONCLUSION

For the reasons stated above, the BVA's December 12, 1995, decision is AFFIRMED.

STEINBERG, Judge, dissenting:

I would reverse the Board of Veterans' Appeals (BVA or Board) decision and remand the claim of clear and unmistakable error (CUE) for Board adjudication.

By its action today, the Court effectively grants a license to the BVA that permits it, by merely stating that it has reviewed all the evidence of record and decided a claim de novo, to immunize from review for CUE a prior final Department of Veterans Affairs (VA) regional office (RO) decision *never appealed to the Board.* In practical

terms, the Court's decision obviates a claimant's rights to the following as to such a claim: To file a claim as to a particular issue (here a CUE claim); to receive a decision on that issue; to identify an issue for appeal and express disagreement; to receive a Statement of the Case; to perfect the appeal and submit argument on behalf of a position; and to receive a hearing.[1] It also effectively eliminates the right to judicial review of whether a Board denial of a CUE claim on the merits is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, a right embedded in our case law since 1992. *See Russell v. Principi*, 3 Vet.App. 310, 315 (1992) (en banc).

This abrogation of claimant rights is unwarranted as a matter of statutory and regulatory analysis and is inconsistent with Court precedent that has resisted prior attempts by the Secretary to thwart rights to judicial review.

A. The Secretary's Flawed Position

As a general matter, I reject the position proposed by the Secretary and VA General Counsel's Precedential Opinion 14-95 (May 12, 1995) [hereinafter G.C. Prec. 14-95] on the basis of *Smith (William) v. Brown*, 35 F.3d

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[1] *See* 38 U.S.C. § 7105(a), (d); 38 C.F.R. §§ 3.103, 19.29, 20.201, 20.202, 20.700 (1996); *Austin v. Brown*, 6 Vet.App. 547, 551-52 (1994); *Thurber v. Brown*, 5 Vet.App. 119, 122-23 (1993); *Hamilton v. Brown*, 4 Vet.App. 528, 544 (1993) (en banc), *aff'd*, 39 F.3d 1574 (Fed.Cir.1994); *Bernard v. Brown*, 4 Vet.App. 384, 390-91 (1993).

1516 (Fed.Cir.1994), that, as a matter of law, all merits decisions of the Board on a claim to reopen subsume prior otherwise final (unappealed) decisions of a VARO on the same claim. Moreover, although the Court purports to be limiting its holding regarding "delayed subsuming" under G.C. Prec. 14-95 "to the facts here", *ante* at 408, I believe that the instant facts are such that whatever viability the Secretary's position has it should not be applied to this case. As to this case, the Secretary's brief relies upon the fact that the 1988 BVA decision reviewed the evidence "de novo", apparently found new and material evidence under step two of *Manio v. Derwinski*, 1 Vet.App. 140, 145 (1991), and then reopened the prior denial of the claim and went on to consider all the evidence of record. *See* Brief at 12. The G.C. Prec. 14-95 suggests that such a BVA review would always expose any CUE in the prior RO decision and therefore must be considered to have subsumed that prior decision. As demonstrated below, that position is demonstrably incorrect on the facts of this very case.

*1. **As Applied to Evidence in this Case:*** Here, even though the 1988 BVA decision considered all the same evidence as did the 1947 RO decision, it ***also*** considered ***new negative evidence.*** There is absolutely no connection between there having been CUE in the 1947 RO decision and the 1988 BVA decision's having correctly denied service connection because negative evidence newly obtained by that later time precluded an award of service connection. The 1988 BVA decision thus has no bearing upon whether the RO committed CUE in 1947, a determination that we have said time and again is to be "based on the record and the law that existed at the time of the

prior . . . decision." *Crippen v. Brown*, 9 Vet.App. 412, 418 (1996) (quoting *Russell*, 3 Vet.App. at 314). An adjudication by an RO currently of a claim of CUE in the 1947 RO decision could not and would not produce the kind of collateral attack on the 1988 BVA decision about which the Federal Circuit expressed concern in *Smith*,[2] because in that 1988 BVA decision the Board concluded only that, based upon the evidence ***in 1988***, the veteran was not entitled to service connection ***in 1988***. Hence, any RO now adjudicating CUE could not consider the evidence newly presented in 1988 and would be concerned only with the veteran's entitlement ***in 1947*** on the record then before the RO.

More particularly, the 1988 BVA decision expressly took into account December 1985 and February 1987 VA medical examinations that found no psychiatric disability (Record (R.) at 131-33, 175-76), as well as a February 1986 social and industrial survey (R. at 125-28). In contrast, the 1947 RO decision had before it only the VA diagnosis of psychoneurosis within one year after service (*see* R. at 68) – which was the only medical evidence in the case at that time as to the appearance of a psychiatric disability

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[2] "[I]n the administrative structure Congress has created, the Board [of Veterans' Appeals (Board or BVA)] is an appellate authority, and the [agencies of original jurisdiction] AOJs are trial-level adjudicators. This . . . tends to preclude the inference that the drafters of § 3.105(a) intended [clear and unmistakable error] CUE review to apply to both Board and AOJ decisions, since it would, oddly, permit an inferior to collaterally review the actions of a superior". *Smith (William) v. Brown*, 35 F.3d 1516, 1526 (Fed.Cir.1994).

within the one-year presumption period.[3] The RO in its 1947 decision could have committed CUE by denying service connection if all the evidence were favorable as to the occurrence of a compensable psychiatric disability within an applicable presumption period; in any event, that is the CUE claim that the Board in December 1995 refused to adjudicate and that the Board should be ordered to adjudicate on remand, in my view. *See Russell*, 3 Vet.App. at 320 (CUE issue properly raised to but not adjudicated by BVA remanded for adjudication by BVA). Hence, on the facts of this case, the 1988 BVA decision cannot properly be considered to have subsumed the 1947 RO decision.

2. ***Effective-Date Consideration:*** Quite independent of the evidentiary issues discussed above, which I think are themselves sufficient for rejecting the Secretary's position as applied to ***this*** case, there is also an effective-date issue that demonstrates that the 1988 BVA decision did not subsume the 1947 RO decision. Absent a finding of CUE, the 1988 BVA decision on the claim to reopen could have awarded service connection only from the September 1985 date of that claim to reopen (which the

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[3] Service connection for Department of Veterans Affairs (VA) disability compensation purposes will be awarded to a veteran who served on active duty during a period of war, or during a post-1946 peacetime period, for any disease or injury that was incurred in or aggravated by a veteran's active service or for certain diseases that were initially manifested, generally to a degree of 10% or more, within a specified presumption period after separation from service. *See* 38 U.S.C. §§ 1110, 1112(a), 1116, 1131, 1133(a), 1137; 38 C.F.R. §§ 3.303(a), 3.306, 3.307 (1996).

BVA disallowed). *See* 38 U.S.C. § 5110(a) (effective date of award based on claim to reopen "shall not be earlier than the date of receipt of application therefor"). This would thus have left completely unaddressed the issue of the appellant's entitlement to service connection for the years between the filing of his original claim in October 1946 and his 1985 attempt to reopen, and that is the essence of the appellant's current CUE claim that the Board refused to address in its December 1995 decision here on appeal. To put it in regulatory terms, the earlier RO decision is not subsumed in the later BVA decision on the attempt to reopen because the earlier RO decision is still "final and binding" under 38 C.F.R. § 3.105(a) (1996) ***on the question of entitlement between 1946 and 1985.*** A CUE claim as to the 1947 RO decision could not be a collateral attack on the 1988 BVA decision because that decision did not and could not adjudicate entitlement for the years 1946 to 1985.

3. ***Regulatory Analysis:*** Moving to the regulation relied upon by the majority for its decision, 38 C.F.R. § 20.1104 (1996), *ante* at 407, I am mystified as to how a 1985 RO or 1988 BVA decision can be said to have "affirmed" an unappealed 1947 RO decision within the meaning of that regulation.[4] It is undisputed that when the appellant did not file an NOD as to the 1947 RO decision or perfect an appeal to the Board, that decision

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[4] "When a determination of the [AOJ] is affirmed by the [Board], such determination is subsumed by the final appellate decisions." 38 C.F.R. § 20.1104 (1996).

became final.[5] When the RO in April 1986 denied service connection on the claim to reopen, the issue before it was ***service connection in 1985*** and, absent CUE, there was no way for it to affirm, reverse, or otherwise affect the 1947 RO decision in any manner because the RO certainly had no jurisdiction over that final, unappealed decision.[6] The 1988 BVA decision could not have subsumed what it had no jurisdiction over. In fact, the "plain meaning" of § 20.1104's language "affirmed . . . by the final appellate determination" is that the decision to be subsumed had to be on direct appeal to the Board. For example, an appellate court "reverses" a decision directly on appeal to it, as I would do in this case, but it "overrules" prior adverse authority that was not appealed.[7] It seems axiomatic that

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[5] *See* 38 U.S.C. § 7105(b)(1), (c); 38 C.F.R. § 20.302(a), (b) (1996); *see also* 38 C.F.R. § 3.1330 (1938) ("A decision of a rating board unappealed within 1 year shall be final") (this regulation had not been amended as of 1948).

[6] *See Hamilton*, 4 Vet.App. at 533 (quoting *Strott v. Derwinski*, 964 F.2d 1124, 1127-28 (Fed.Cir.1992), which describes process by which veteran can appeal regional office (RO) decision), *aff'd*, 39 F.3d 1574 (Fed.Cir.1994); *Bernard*, 4 Vet.App. at 390-92 (detailing the "series of very specific, sequential, procedural steps that must be carried out" to acquire appellate review); *Grantham v. Brown*, 114 F.3d 1156, 1159 (Fed.Cir.1997) (Archer, Chief Judge, concurring); 38 U.S.C. § 7105; 38 C.F.R. § 20.201 (1996).

[7] According to Black's Law Dictionary, a reversal of a judicial decision refers to the "annulling or setting aside by an appellate court of a decision of a lower court". BLACK'S LAW DICTIONARY 1319 (6th ed.1990) [hereinafter BLACK'S]. However, a "judicial decision is said to be overruled when a later decision, rendered by the same court or by a superior court in the same system, expresses a judgment upon the same question of law directly opposite to that which was before given, thereby

because the 1947 RO decision was not on appeal that final decision could not have been affirmed or, therefore, subsumed by a BVA decision 41 years later.

4. Majority's Alternative Theory: As to the alternative theory put forth by the majority in the last two sentences of its part II – that the granting of the CUE claim and award of service connection as of 1947 would "of necessity mandate service connection to the present time" and "would, in effect, overturn the 1988 BVA decision", *ante* at 409, that presents a problem of sorts but not an insurmountable one. The Federal Circuit's *Smith* opinion prohibits collateral review by an RO of a BVA decision. Review of the 1947 RO decision, if that decision is not found to be subsumed in the 1988 BVA decision, cannot be collateral review of a BVA decision; the 1988 BVA decision never considered the error that is now up for consideration because, as noted in part A.3., above, that RO decision became final when it was not appealed within a year. A successful CUE challenge to the 1947 RO decision would theoretically create a problem as to the denial of service connection by the 1988 BVA decision because a 1947 grant of service connection could be discontinued only by a decision that would accord with 38 C.F.R. § 3.105(d), and the 1988 BVA decision did not.[8]

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depriving the earlier opinion of all authority as precedent". BLACK'S at 1104.

[8] 38 C.F.R. § 3.105(d) (1996) provides now, and did in 1988, the method by which service connection can be severed "[s]ubject to the limitations contained in § [ ] 3.957". That subsection, which cites 38 U.S.C. § 1159 for its authority, provides:

However, the effect on that BVA decision would not be "collateral" review because, in essence, the RO could find CUE as to service connection in 1947 without in any way addressing the 1988 BVA decision, and that is our only concern at this point.

How long those benefits extend is a matter for another case and is not before us here. It may be true that *Smith* would absolutely preclude that an award of benefits based on CUE in the 1947 RO decision be extended beyond the date of the 1988 BVA decision – no matter how flawed or correct that 1988 BVA decision was in not applying § 3.105(d) when the Board had no way of then knowing that the veteran "was" service connected as a result of CUE in the 1947 RO decision – unless the Board decides to find "obvious error", under 38 U.S.C. § 7103(c),[9] in its 1988 decision. Nevertheless, an award

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> Service connection for any disability or death granted or continued under title 38 U.S.C., which has been in effect for 10 or more years will not be severed except upon a showing that the original grant was based on fraud or it is clearly shown from military records that the person concerned did not have the requisite service or character of discharge.

38 C.F.R. § 3.957 (1996); *see* 38 U.S.C. § 1159 (service-connection award in effect for 10 years cannot be severed "except upon a showing that the original grant of service connection was based on fraud or it is clearly shown from military records that the person concerned did not have the requisite service or character of discharge").

[9] A BVA decision as to "obvious error" is not a matter that this Court may review. *See Chisem v. Brown*, 4 Vet.App. 169, 177 (1993) (Board has "discretion to *correct* an 'obvious' error, when one is found" and that discretion is not subject to review in this Court); 38 U.S.C. § 7103(a) (decision of Board is final unless

from 1947 to 1985 would not overlap at all with what was before the Board in 1988 and with what was decided in that Board decision, and an RO decision making such a CUE award therefore could not constitute the forbidden collateral review of ***that*** BVA decision.

B. Larger Impact: The Right to Judicial Review

Finally, it should be understood that the doctrine of "delayed subsuming" that the Secretary is propounding is a most pernicious one – it would allow the BVA to wipe out any potential CUE claims as to prior unappealed RO decisions on the same issue under review by the BVA by including in its decision, sua sponte, a sentence stating that it had reviewed the claim de novo, including the disposition of the prior RO decision(s). I do not think that is what the Federal Circuit had in mind in its opinion in *Smith*. Rather, this situation is analogous to the one presented to this Court in another *Smith* case, where the Court ruled that the BVA Chairman could not "defeat the right to judicial review at a critical juncture in a case by ordering reconsideration of a prior [BVA] decision which is beyond the reach of that right." *Smith (George) v. Brown*, 8 Vet.App. 546, 552 (1996) (en banc). Hence, the Court there held that "the appellant's right to judicial review of his claim conferred by his post-VJRA NOD [Notice of Disagreement][10] and thereafter perfected was not extinguished in this case even though a BVA decision which

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Chairman orders reconsideration), (c) (notwithstanding section 7103(a), Board may correct "obvious error").

[10] *See* Veterans' Judicial Review Act (VJRA), Pub.L. No. 100-687 § 402, 102 Stat. 4105, 4122 (1988) (found at 38 U.S.C.

was based on a pre-VJRA NOD was subsequently vacated and replaced by a BVA reconsideration decision." *Id.* at 553. Similarly, this Court has held that the Board cannot refuse to rule on a claim properly appealed to it and thereby deny to a claimant a BVA decision that can then be appealed to this Court. *See In the Matter of the Fee Agreement of Cox*, 10 Vet.App. 361, 372-73 (1997) [hereinafter *In re Cox*].

On the other side of the coin, in *Hamilton*, the Court noted that "where . . . the claimant expressly indicates an intent that adjudication of certain specific claims not proceed at a certain point in time, neither the RO nor BVA has authority to adjudicate those specific claims, absent a subsequent request or authorization from the claimant or his or her representative". *Hamilton v. Brown*, 4 Vet.App. 528, 544 (1993) (en banc), *aff'd*, 39 F.3d 1574 (Fed.Cir.1994). The Court there stressed:

> A contrary result would permit the RO or Board to act in a way that could prejudice a claimant's enjoyment of statutory and regulatory procedural rights (such as a detailed SOC under section 7105(d)) by deciding a claim on a record that had not been adequately developed. *See, e.g.*, 38 C.F.R. § 3.103 (1992) (right, inter alia, to written notice of an RO decision on the claim, to a hearing, to representation, to produce witnesses and introduce any available evidence any

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§ 7251 note) (requiring post-November 17, 1988, NOD as to claim appealed to BVA in order for this Court to have jurisdiction to review BVA decision on that claim); *Grantham* and *Hamilton*, both *supra* note 6.

> arguments, and to VA assistance); *Bernard* [*v. Brown*, 4 Vet.App. 384, 392-94 (1993)].

Ibid. In *Sutton v. Brown*, 9 Vet.App. 553, 564 (1996) (citing *Bernard*, 4 Vet.App. at 394), the Court stated:

> [W]hen the Board addresses in its decision a question that has not been addressed by the RO, it must consider (1) whether the claimant has been given both adequate notice of the need to submit evidence or argument on that question and an opportunity to submit such evidence and argument and to address that question at a hearing, and (2) whether, if such notice has not been provided, the claimant has been prejudiced thereby.

See also Curry v. Brown, 7 Vet.App. 59, 66-67 (1994). As a general matter, *Sutton* and *Bernard*, both *supra*, stand for the proposition that the Board should not consider issues not considered by the RO decision on appeal to it and if the Board does so it should do so only with the full and informed participation of the appellant.

In the instant case, it is clear that the Board's action in 1988, while not before us directly in this appeal, is being transformed by the majority into a CUE review as to that RO decision, one made without the participation of the claimant and without his having been advised of the implication of that action.[11] This is exactly the kind of unilateral Board action that the fair-process rules established in *Bernard* and *Sutton*, both *supra*, as well as in

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[11] *See Talbert v. Brown*, 7 Vet.App. 352, 355-56 (1995) (Court is without jurisdiction to review CUE claim once adjudicated by the Board and unappealed because that issue is res judicata) (citing *Russell v. Principi*, 3 Vet.App. 310, 315 (1992) (en banc)).

Thurber v. Brown, 5 Vet.App. 119, 122-23 (1993), and *Austin v. Brown*, 6 Vet.App. 547, 551-52 (1994), were designed to forestall. Yet, the Court today gives to the Board a similar power to insulate VA decisions from judicial review (in a CUE context) by purporting to have reviewed them and to have done so in a way that will not be subject to judicial review because the RO decision in question was not appealed to the Board by a post-November 17, 1988, NOD.[12] The Board (and the majority) have thus stripped from the appellant the right to judicial review that was conferred by his ***post***-VJRA NOD as to his CUE claim (R. at 282).

The cases discussed above demonstrate a special concern on this Court's part to guard against unwarranted or unauthorized incursions against judicial review by the Secretary. The only reason for this Court's existence is to bring to an end a long-entrenched rule where the Secretary was a law unto himself, immune from any judicial scrutiny.[13] Just as the Court has refused to permit the Board to act in a way to deny or prejudice judicial review – by, sua sponte or otherwise, reconsidering a prior BVA decision (*see Smith (George), supra*) or by refusing to issue a BVA decision (*see In re Cox, supra*) – or to decide issues

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[12] *See supra* note 10.

[13] *See* S.REP. No. 100-418, at 30-31 (1988) ("This legislation [VJRA] is designed to ensure that all veterans are served with compassion, fairness, and efficiency, and that each individual veteran receives from [ ] VA every benefit and service to which he or she is entitled under law"); 134 Cong. Rec. 31454, 31465 (1988) (statement of Sen. Cranston) ("One of the principal reasons judicial review is needed is to help ensure fairness to individual claimants before [ ] VA").

not decided by an RO (*see Sutton, Curry,* and *Bernard,* all *supra*), or to decide issues without fair notice and opportunity to respond to Board-acquired evidence (*see Austin* and *Thurber,* both *supra*), so here the Court should not be permitting – in this case or any other – the administrative adjudication of claimant rights without the claimant's full and fair participation (*see Hamilton, supra*) or be facilitating the resulting abrogation of a claimant's right to judicial review.[14] As Circuit Judge Plager recently wrote:

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[14] A case such as this may demand a legislative resolution in order to ensure the participatory and fair adjudicative process within VA as well as the availability of judicial review that Congress intended, just as may the situation where the Board, sua sponte, adjudicates a CUE claim without notice to an appellant and thereby denies that appellant an opportunity to bring an appeal to the Court of such an adverse BVA decision because there would be no jurisdiction-conferring NOD, the RO not having addressed CUE. *See Tablazon v. Brown,* 8 Vet.App. 359, 361 (1995) (where veteran filed NOD but RO never issued Statement of the Case to enable veteran to perfect appeal to Board, Board erred in treating RO decision as final); *Grantham,* 114 F.3d at 1158-59 (NOD cannot place in appellate status issue that could not have been decided by RO); *Barrera v. Gober,* 122 F.3d 1030, 1032 (Fed.Cir.1997) ("court recently held in [*Grantham*] that a veteran's overall claim, or case, for benefits is comprised of separate issues, and that the Court of Veterans Appeals has jurisdiction to consider an appeal concerning one or more of those issues, provided a[n] NOD has been filed after the effective date of the [VJRA] with regard to the particular issue"). *But cf. United States v. Corrick,* 298 U.S. 435, 440, 56 S.Ct. 829, 832, 80 L.Ed. 1263 (1936) ("[w]hile the District Court lacked jurisdiction[,] we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit"); *In the Matter of the Fee Agreement of Hugh D. Cox,* 10 Vet.App. 361, 371 (1997) ("if the Court's granting of the petitioner's petition would lead to a BVA

"[W]hen construing ambiguities [in the VJRA, we] should err, if we err at all, on the side of protecting a veteran's right to the judicial review Congress has mandated". *Barrera v. Gober,* 122 F.3d 1030, 1040 (Fed.Cir.1997) (Plager, J., concurring).

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decision over which the Court would have jurisdiction, the Court would possess jurisdiction to issue a writ of mandamus; VA cannot frustrate this Court's statutory appellate jurisdiction by refusing to issue an otherwise required decision that the Court could directly review").